Supreme Court, U. S.
FILED
JUN 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1828

GUY SPARKS AND THE CALHOUN COUNTY, ALABAMA, BAR ASSOCIATION, AN UNINCORPORATED ASSOCIATION,

Appellants,

versus

ROBERT M. PARKER, PRESIDING JUDGE, SEVENTH JUDICIAL CIRCUIT, STATE OF ALABAMA,

Appellee.

On Appeal from the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

GUY SPARKS
Appellant, pro se
Attorney
409 Commercial Bank Building
Anniston, Alabama 36201
Telephone (205) 237-5711

RICHARD B. EMERSON
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586

Counsel for Appellant,
Calhoun County, Alabama,
Bar Association

June ____, 1979

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

INDEX

Page

Jurisdictional Statement 1

Opinions Below 2

Jurisdiction 3

Constitutional Provisions, Statutes and Decisions 4

Questions Presented 5

Presenting the Federal Questions 5

Statement of the Case 7

The Questions Are Substantial 13

Conclusion 25

Appendix 1a

APPENDIX

Final Judgment and Opinions on Rehearing, S.Ct. of Ala., March 9, 1979 ..... 1a

§15-12-21, Code of Alabama 1975 ..... 18a

§15-12-22, Code of Alabama 1975 ..... 19a

§15-12-23, Code of Alabama 1975 ..... 21a

Order, S.Ct. of Ala., February 9, 1979 ..... 22a

§15-12-1, Code of Alabama 1975 ..... 24a

§15-12-2, Code of Alabama 1975 ..... 26a

§15-12-3, Code of Alabama 1975 ..... 26a

§15-12-4, Code of Alabama 1975 ..... 27a

§15-12-5, Code of Alabama 1975 ..... 29a

INDEX (Continued)

Page

§15-12-6, Code of Alabama 1975 ..... 30a

§15-12-20, Code of Alabama 1975 ..... 30a

Constitutional Provisions: Fifth, Sixth, Thirteenth and Fourteenth Amendments 31a

Ex parte Order, Cir.Ct., Calhoun County, Alabama, December 27, 1977 ..... 32a

Ex parte Order, Juvenile Division, Dist.Ct., Calhoun County, Alabama, December 28, 1977 ..... 37a

Ex parte Order, Criminal Division, Dist.Ct., Calhoun County, Alabama, December 28, 1977 ..... 39a

Ex parte Order, Criminal Division, Dist.Ct., Calhoun County, Alabama, March 16, 1978 ... 43a

Judgment, Cir.Ct., Calhoun County, Alabama, June 28, 1978 ..... 45a

Donald Thigpen v. State (of Alabama), Ala. Ct. of Crim. Appls., 6 Div. 938, 1979; pending on application for rehearing 51a

Notice of Appeal to S.Ct., U.S., of Guy Sparks ... 57a

Notice of Appeal to S.Ct., U.S., of Calhoun County Bar Association 60a

CITATIONS

Cases: Page

Argersinger v. Hamlin, 407 U.S. 25 (1972) 14,18

Aubrey Scott, Petitioner v. State of Illinois, ____ U.S. ____, 59 L.Ed.2d 383, [No. 77-1177] (1979) ..14,18

Bounds v. Smith, 430 U.S. 817 (1977) 14,15,18

Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972) ...14,20

Cohen v. Hurley, 366 U.S. 117 (1961) 16

Donald Thigpen v. State (of Alabama), Ala. Ct. of Crim. Appls., 6 Div. 938, 1979; pending on application for rehearing 4,5,21, 48a-53a

Estelle v. Gamble, 429 U.S. 97 (1976) 15

Ferri v. Ackerman, ____ S.Ct. ____, ____ U.S. ____, [No. 78-5981]; cert. granted February 20, 1979 16

Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963) 18,20,23

NAACP v. Buttons, 371 U.S. 415 (1963) 16

Ohralik v. Ohio State Bar Assn., ____U.S. ____, 56 L.Ed.2d 444, 98 S.Ct. 1912, [No. 76-1650] (1978) 16

Powell v. Alabama, 287 U.S. 45 (1932) 22,23,24

Smith v. State, 394 A.2d 834 (N.H. 1978) 14,20

State ex rel. Partain v. Oakley, 227 S.E.2d 314 (W.Va. 1976) 14,20

CITATIONS (Continued)

Page

State v. Green, 470 S.W.2d 471 (Mo. 1971) 14,20

State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966) 14,20,23

Younger v. Gilmore, 404 U.S. 15 (1971) 14

Constitutional Provisions:

Fifth Amendment 2,4,5,6,15,17,31a

Sixth Amendment 2,4,5,6,15,31a

Thirteenth Amendment 2,4,5,6,15,31a

Fourteenth Amendment 2,4,5,6,15,17,32a

Federal Statutes:

28 U.S.C. §1257(2) 4

State Statutes:

§15-12-1, Code of Alabama 1975 ..... 4,8,24a-25a

§15-12-2, Code of Alabama 1975 ..... 4,25a-26a

§15-12-3, Code of Alabama 1975 ..... 4,26a-27a

§15-12-4, Code of Alabama 1975 ..... 4,27a-28a

§15-12-5, Code of Alabama 1975 ..... 4,29a

§15-12-6, Code of Alabama 1975 ..... 4,30a

§15-12-20, Code of Alabama 1975 ..... 4,30a-31a

§15-12-21, Code of Alabama 1975 ..... 1,4,5,6,8,24,18a-19a

CITATIONS (Continued)

Page

§15-12-22, Code of Alabama 1975 ..... 1,4,5,6,8,24,19a-20a

§15-12-23, Code of Alabama 1975 ..... 1,4,5,6,8,9,24,21a-22a

Other Authorities:

60 *Ky. L.J.* 710 14

Amer. Bar Conference on Legal Needs 19

Draft Discussion Proposal of the Amer. Bar Assn. Standing Committee on Legal Aid and Indigent Defendants, February, 1978, Draft 14,19

Nat'l Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure* (1974) 19

Nat'l Legal Aid and Defender Assn, *The Other Face of Justice* 19,20

Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963) 22

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

GUY SPARKS AND THE CALHOUN COUNTY, ALABAMA, BAR ASSOCIATION, AN UNINCORPORATED ASSOCIATION,

Appellants,

versus

ROBERT M. PARKER, PRESIDING JUDGE, SEVENTH JUDICIAL CIRCUIT, STATE OF ALABAMA,

Appellee.

On Appeal from the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

Guy Sparks and the Calhoun County Bar Association, appellants, appeal from final judgment of the Supreme Court of Alabama, dated March 9, 1979, holding §15-12-21 through §15-12-23, Code of Alabama 1975, as applied in this case, constitutional and not violative of appellants' rights not to:

(a) be compelled into involuntary servitude, as guaranteed by the Thirteenth Amendment of the Constitution of the United States;

(b) be deprived of liberty, or property, without due process of law, as guaranteed by Fifth and Fourteenth Amendments;

(c) have private property taken for public use, without just compensation, as guaranteed by the Fifth Amendment;

(d) be denied equal protection of the laws by any state, as guaranteed by the Fourteenth Amendment;

(e) be compelled to participate in a system of appointing counsel for juvenile and criminally-charged indigents that denies the latter effective assistance of counsel guaranteed by Sixth and Fourteenth Amendments.

OPINIONS BELOW

The opinion and ensuing Order of the Supreme Court of Alabama, reprinted, pp. 1a-17a, 22a-24a, *infra*, are unreported.

The ex parte Order of appellee, Presiding Judge Robert M. Parker, Seventh Judicial Circuit of Alabama, December 27, 1977, reprinted, pp. 32a-36a, *infra*, is unreported.

Three ex parte Orders of the District Court, Calhoun County, Alabama, one by the Juvenile Division, December 28, 1977, two by the Criminal Division, December 28, 1977, and March 16, 1978, implementing Circuit Court Order of December 27, 1977, are unreported. They are reprinted, pp. 37a-40a, *infra*.

Judgment of appellee, Presiding Judge Robert M. Parker, June 28, 1978, overruling appellants' motion to rescind, modify, or grant other relief from his ex parte Order of December 27, 1977, is unreported. It is reprinted, pp. 45a-51a, *infra*.

JURISDICTION

Judgment of the Supreme Court of Alabama, indefinitely or permanently compelling Guy Sparks and all members of Calhoun County Bar Association not having adverse interest, to involuntarily and continuously provide all necessary legal services on behalf of the State of Alabama for all juvenile and criminally-charged indigents in Calhoun County, Alabama (and in Cleburne County when specifically ordered), either without compensation or at compensation "... generally wholly inadequate to even cover ... office expenses" (Jud., Cir.Ct., p. 46a, *infra*) attributable to such services, was entered February 9, 1979. Motion for rehearing was denied March 9, 1979, two Justices dissenting for reason there and here urged. pp. 16a-17a, *infra*.

Notice of appeal to this Court was filed in the Supreme Court of Alabama by Guy Sparks March 13, 1979, by Calhoun County Bar Association May 10, 1979. pp. 57a-63a, *infra*.

This appeal is docketed within 90 days from denial of rehearing below. Jurisdiction is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND DECISIONS

Fifth, Sixth, Thirteenth and Fourteenth Amendments, United States Constitution: Their full text appears at pp. 31a-32a, *infra*.

State statutes whose validity is involved are in Volume 12, Code of Alabama 1975, pp. 602 through 605, cited as §15-12-21, §15-12-22 and §15-12-23. Their full text is attached to final opinion, Supreme Court of Alabama, pp. 18a-22a, *infra*.

State statutes otherwise involved but not asserted invalid are in Volume 12, Code of Alabama 1975, pp. 598 through 601, cited as §15-12-1 through §15-12-6, and §15-12-20. Their full text appears at pp. 24a-30a, *infra*.

Donald Thigpen v. State (of Alabama), Alabama Court of Criminal Appeals, 6 Div. 938, 1979; pending on application for rehearing: Its full text appears at pp. 51a-56a *infra*.

QUESTIONS PRESENTED

Whether §15-12-21, §15-12-22 and §15-12-23, Code of Alabama 1975, are violative of involuntary servitude provision of the Thirteenth Amendment of the Constitution of the United States, or due process clauses of Fifth or Fourteenth Amendments, or the prohibition of the Fifth Amendment against taking private property for public use, without just compensation, or the equal protection clause of the Fourteenth Amendment, or of the effective assistance of counsel and due process clauses of Sixth and Fourteenth Amendments, when applied to obligate and compel 52 privately practicing lawyers to indefinitely or permanently, involuntarily and continuously, provide all necessary legal services on behal. of the State for all juvenile and criminaliy-charged indigents whose cases arise in the County in which such lawyers practice, and in one adjoining County when specifically ordered, either without compensation or at compensation inadequate to cover office expenses attributable to such services.

PRESENTING THE FEDERAL QUESTIONS

At earliest stage of proceedings below appellants raised claims, by motion to rescind or modify the original December 27, 1977, ex parte Order of the Circuit Court and implementing ex parte Orders of the

District Court, that the Orders ". . . denied equal protection of the laws guaranteed by Amendment XIV of the Constitution of the United States. . .", were ". . . contrary to Amendments V and XIV of the Constitution of the United States . . .", compelled ". . . involuntary servitude, contrary to Amendment XIII of the Constitution of the United States. . .", denied ". . . due process guaranteed by the Fourteenth Amendment of the Constitution of the United States . . ." and ". . . the right of counsel provided by the Sixth Amendment of the United States Constitution as such Amendment is incorporated in the Fourteenth Amendment of the United States Constitution." The Court found such objections without merit and overruled appellants' motion. Jud., Cir.Ct., pp. 45a, 50a, *infra*.

All such claims were reiterated before the Supreme Court of Alabama, by mandamus and appeal. That Court noted appellants were " . . . seeking to have this Court (S.Ct., Ala.) determine that §15-12-21 through §15-12-23, Code of 1975, are unconstitutional." Op., S.Ct., Ala., p. 2a, *infra*. It began consideration of Sixth and Fourteenth Amendment claims respecting denial of effective assistance of counsel on p. 3 of the opinion. *Ibid.*, pp. 2a-3a, *infra*. Consideration of other claims respecting Fifth, Thirteenth and Fourteenth Amendments began on p. 7. *Ibid.*, pp. 6a-7a, *infra*. Though finding the situation "unjustifiable," the Court held,

> "Nevertheless, the statutes in question do not infringe upon the constitutional rights of

> appellants for the reasons we have given and the June 28, 1978, order denying appellants' motion to vacate, modify or set aside the order establishing the circuit's indigent defense system is affirmed.
>
> "MANDAMUS DENIED. APPEAL AFFIRMED."
>
> *Ibid.*, pp. 15, 16, pp. 15a-16a, *infra*.

The Alabama Supreme Court thus considered and expressly rejected these constitutional claims.

STATEMENT OF THE CASE

Appellant, Guy Sparks, admitted to practice in Alabama in 1950, has individually engaged in private practice of law in Anniston, Calhoun County, Alabama, as his sole means of livelihood, at all material times since. Appellant, Calhoun County Bar Association, is an unincorporated association whose voting membership is composed of all attorneys licensed to practice in Alabama who do so in Calhoun County.

On December 27, 1977, pursuant to statutes here involved, appellee entered an ex parte Order mandating an involuntary indigent defense system for the Circuit, composed of Calhoun and Cleburne Counties, Alabama, 1977 populations 112,300 and 11,800. The Order named and was directed at every practicing member of the Association not having a conflict of interest, without respect to fact that some did not otherwise practice juvenile or criminal law.

> "Under the indigent defense system instituted by the Court, it was ordered that the 'team system' be utilized for indigent felony appointments. Fifty-two eligible Calhoun County attorneys were appointed to four teams, each team consisting of thirteen attorneys and each team being eligible for appointment during three months of each year. In misdemeanor and juvenile cases, the order provided that attorneys would be appointed alphabetically." Op., S.Ct., Ala., p. 2a, *infra.*

The Order " . . . perpetuated a systematic program for indigent defense in Calhoun County; . . ." and furnished " . . . the Juvenile Division of the Calhoun County District Court with attorneys . . ." Dist.Ct. Order, p. 37a, *infra.* It replaced similar Orders by which " . . . the Bar of this State has for 15 years or more borne the burden of defense of indigents." Jud., Cir.Ct., p. 48a *infra.* An indigent is defined in §15-12-1, Code of Alabama 1975, as,

> "Any person involved in a criminal or juvenile proceeding in the trial or appellate courts of the state for which proceeding representation by counsel is constitutionally required and who . . . is found by the court to be financially unable to pay for his defense." pp. 24a-25a, infra.

Compensation and obligation to accept indigent appointments are specified in §15-12-21, §15-12-22, §15-

12-23, Code of Alabama 1975. pp. 18a-22a, *infra.* The first provides maximum payment in trial courts at $10 per hour for out of court time, $20 for in court time, total fees and expenses in one case not to exceed $500. The second provides payment at the same hourly rate for appeals, total not to exceed $1000, including fees on trial in lower court. The third provides payment at same hourly rate for post conviction proceedings, total in trial court not to exceed $300 and not to exceed $1000 in any appeal, including fees on trial. All three statutes provide that on appointment ". . . it shall be the duty of such appointed counsel, as an officer of the court and as a member of the bar, to represent said defendant." *Ibid.*

In District Court juvenile proceedings instituted by Alabama Department of Pensions and Security, maximum payment allowed is $35, without regard to time or expense incurred.

No payment is made for time spent on call, attending docket calls where no appointment is made, or providing the State a substitute, all mandated by the Orders. Dist. Ct. Orders, pp. 37a-44a *infra.* Lack of funding and uncertainty by the State and County as to which was obligated to pay for representing juveniles sometimes resulted in no payment for any kind of services performed under the statutes and Orders. In consequence attorneys not infrequently submitted no claim for payment.

Such Orders enforced upon appellants

> ". . . a situation where one person had to work for another, whether he wanted to or not, and without regard whether he will get paid; and further, if he is paid some sum it is generally wholly inadequate to even cover part of his office expenses."
> Jud., Cir.Ct., p. 46a, *infra*.

"The cases are voluminous, the burden is heavy, the compensation is poor to non-existent." *Ibid.*, p. 46a, *infra*. " . . . crime and domestic relation cases are the most prevalent cases in Court." *Ibid.*, p. 49a, *infra*.

> "If there was (sic) adequate funding of the Court System, this motion would not be in existence as volunteers would handle all indigent cases . . . this has not occurred, . . ." *Ibid.*, p. 50a, *infra*.
>
> "How long this situation will endure is unknown. How long must the Bar of this State suffer the financial burden of defense of indigents instead of the State? Chapter 12 of Title 15 (which includes §15-12-21 through §15-12-23, Code of Alabama 1975) gives several alternatives for indigent criminal defense. None have (sic) been reasonable funded or reasonably attempted." *Ibid.*, p. 48a, *infra*.

Pursuant to cited statutes and Orders, Guy Sparks and others are conscripted by the State to provide legal

services on behalf of the State for all juvenile and criminally-charged indigents in Calhoun County on a continuous and permanent basis, and in an adjoining County on sporadic basis. They are compelled to represent them at all critical stages, including line-ups, custodial interrogation, preliminary hearings, trial preparation, trials, juvenile matters, probation and parole revocation hearings, appeals, habeas corpus and other post conviction proceedings. Such services include representing those charged by the State with misdemeanors or felonies.

Attorneys individually spend from approximately 5% to approximately 25% of their total professional time in such work. Most spend between 15% and 20%. They must provide not only their own labor, but secretarial labor and use of their offices and office facilities. On one appellate case Guy Sparks spent 237 hours, approximately 13% of his annual professional time, and $369.60 in expenses. He was paid $1000 for his work, work of his secretary, use of his office and office facilities, and in reimbursement of the $369.60.

The Senior of three Circuit Judges of the Circuit made affidavit, as did one of three District Judges, both of record. The former stated,

> ". . . at the present time practically all indicted defendants request assigned counsel and there are an estimated 5% of them that employ their own attorney."

He estimated that of approximately 400 separate felony cases in the Circuit Court of Calhoun County in 1977, 380 were assigned counsel. Noting "The lawyers are given no option about whether they will represent such indigents", the latter stated:

> "In the Criminal Division of the District Court of Calhoun County the Court handled 1,459 criminal cases, exclusive of traffic cases, from January 16, 1977, through December 31, 1977 . . . I would estimate, however, that approximately half of these had appointed lawyers. In my judgment the number of criminal cases in this Court will continue to increase and the number of indigents who will require appointed lawyers will likewise increase."

Both affidavits outlined increasing complexity and ". . . constantly increasing number of indigent criminal and juvenile cases the lawyers are being required by our Courts to defend."

In the Juvenile Division 1,286 other cases were handled in 1977. Guy Sparks and local attorneys were assigned to approximately two-thirds to three-fourths.

Cases in Cleburne County, appeals to the Alabama Court of Criminal Appeals and the Supreme Court of Alabama, juvenile and misdemeanor appeals from District to Circuit Court, other civil cases involving

juveniles, pretrial identification procedures, probation and parole revocation hearings and post conviction proceedings involuntarily handled by Guy Sparks and others in 1977 were many. No records existed reflecting the total. While considerable, neither could exact time spent at docket calls and remaining "on call" for "emergencies" be shown, no records existing.

The State obtains reasonably paid, voluntary assistance of attorneys to render all legal services in prosecuting indigents and juveniles. It provides those lawyers with office facilities, secretarial and all other necessary aid, including experts for investigation and other assistance. The State provides no assistance, other than transcript on appeal, to those compelled to defend such indigents and juveniles.

Neither Guy Sparks nor any attorney at whom the Orders were directed ever agreed to such Orders or to perform the obligatory services, either free of charge or for the payment made, as condition of their licensure or otherwise.

THE QUESTIONS ARE SUBSTANTIAL

Questions as to constitutional implications of State compulsion of privately practicing lawyers to carry all or virtually all burdens of required legal service for indigents are novel and substantial. They have never been decided by this Court. This Court has indicated, however, such burdens and their costs fall to States, this being a "duty" "necessary" to and "implicit" in the

constitutional rule requiring States to provide effective counsel. *Aubrey Scott, Petitioner v. State of Illinois*, ____ U.S. ____, 59 L.Ed.2d 383, [No. 77-1177] (1979); *Bounds v. Smith*, 430 U.S. 817 (1977); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Younger v. Gilmore*, 404 U.S. 15 (1971). In *Argersinger v. Hamlin, supra*, 55, 57, 58, Mr. Justice Powell, concurring, indicated, too, that "In addition to the expense of compensating counsel . . .", States must seek "willing" counsel.

Shifting this burden from the State onto uncompensated (as a practical matter), financially unable and therefore unwilling lawyers, a divided Supreme Court of Alabama disagreed. It likewise differed with principles of decisions of highest courts of other States that reached results sought by appellants, *Smith v. State*, 394 A.2d 834 (N.H. 1978); *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W.Va. 1976); *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972); *State v. Green*, 470 S.W.2d 471 (Mo. 1971); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966), as well as conclusions of law journals and other studies. 60 *Ky. L.J.* 710; *Draft Discussion Proposal of the Amer. Bar Assn. Standing Committee on Legal Aid and Indigent Defendants*, February, 1978, Draft.

This Court's

> " . . . decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them. States must forego collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial, *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972), and in appeals as of right, *Douglas v. California*,[12] 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963)." *Bounds v. Smith, supra*, 824, 825.

Footnote 12 cited *Estelle v. Gamble*, 429 U.S. 97 (1976), ". . . holding that States must treat prisoners' serious needs, a constitutional duty obviously requiring outlays for personnel and facilities." *Bounds v. Smith, supra*, 825.

Alabama "meets" its duty to protect indigents' rights by denying lawyers' rights. It literally forces lawyers into involuntary servitude prohibited by the Thirteenth Amendment, deprives them of liberty and property contrary to Fifth and Fourteenth Amendments, takes their services and other property for public use contrary to the Fifth Amendment, denies them equal protection of the laws guaranteed by the Fourteenth Amendment, and makes them participate in a captive counsel system that cannot provide "adequate, effective, meaningful" assistance guaranteed by Sixth and Fourteenth Amendments. *Ibid.*, 822.

Lawyers are as entitled to protection of these Amendments as others. While States may regulate conduct of lawyers, they may not infringe upon constitutional rights in doing so. *Cohen v. Hurley*, 366 U.S. 117 (1961); *NAACP v. Buttons*, 371 U.S. 415 (1963); *Ohralik v. Ohio State Bar Assn.*, ____U.S. ____, 56 L.Ed.2d 444, 98 S.Ct. 1912, [No. 76-1650] (1978). On February 20, 1979, this Court granted certiorari in *Ferri v. Ackerman*, ____S.Ct. ____, ____U.S. ____, [No. 78-5981]. The case now pends for review of whether a lawyer appointed to represent an indigent defendant in a federal criminal case is immune from civil liability in a State malpractice action brought by the indigent client. Both parties therein contend from the premise of indigent representation by willing counsel. Pet.'s writ, p. 6. Resp.'s brief, pp. 7, 11, 13, 15.

A majority below concluded lawyers, solely because they are lawyers, forfeit rights assured to others and may be subjected to burdens that cannot be placed upon others, Op., S.Ct., Ala., in part., pp. 10a, 11a, 12a, 13a, 17a, *infra*. This Court rejected that approach in *Cohen v. Hurley, supra*, 129, 130. Justification was said below to rest on lawyers' "traditional obligations" (Op., S.Ct., Ala., p. 10a, *infra*), knowledge of such traditions and hence implied "commitment" on licensure (*Ibid.*, p. 10a, *infra*), on their "unique position" (*Ibid.*, p. 13a, *infra*), and on "benefits" (*Ibid.*, p. 12a, *infra*) and "special privileges" bestowed by the State (*Ibid.*, p. 12a, *infra*). (Sole "benefits" or "special privileges" cited were "reimbursement of actual expenses from the State" to Bar Commission members. *Ibid.*, p. 12a, *infra*.)

Would such reasons justify denial of all constitutional rights? (Would they justify similar denial to others?) May government take an ethical ideal of a profession, adopt it as an unlimited, permanent obligation of the profession, and make the State the beneficiary? Is financing legal assistance to indigents an obligation imposed upon the practicing bar alone? Alabama lawyers are required to be members of the Bar Association. Are succeeding compulsions otherwise unconstitutional justified by a permissible first compulsion? Are associational benefits of higher value than constitutional benefits? Do the former supersede the latter even when the two do not conflict?

Is peonage to be counted a virtue? Does the Thirteenth Amendment permit it because of lawful occupation? Because of economic considerations by a State? Do Fifth and Fourteenth Amendments allow taking of liberty, denying equal protection or taking property without just compensation because of such factors? Must lawyers become permanent, unpaid, part-time employees of the State in carrying out the State's obligations to indigents? Are humiliating disabilities of peonage, deprivation of liberty and property expropriation reserved for members of the legal profession alone? Are attorneys to be singled out as uniquely undeserving of protection of civilized constitutional standards applicable to others?

Answers determine whether the practice of law is to remain a profession or become a misfortune.

"This Court . . . finds that the failure of the legislature to provide adequate funds to compensate attorneys . . . is unjustifiable", said the Supreme Court of Alabama. p. 15a, *infra*. It thereby negated any legitimate State interest in legislating what the Court characterized as "the plight of the attorneys" in Alabama. *Ibid.* As thus shown, the State has no interest except avoiding financial inconvenience in " . . . discharge (of) its duty to provide adequate representation for indigent defendants imposed upon the state by *Gideon v. Wainwright*, 372 U.S. 335 (1963) (other citations omitted)." *Ibid.*, p. 12a, *infra*.

This Court has expressed concern with costs to the States. *Aubrey Scott, Petitioner v. State of Illinois, supra; Bounds v. Smith, supra, Argersinger v. Hamlin, supra.* While permitting economic factors to be considered in choosing methods to fulfill constitutional obligations, this Court has not allowed such factors to justify denial of constitutional rights. ". . . cost of protecting a constitutional right cannot justify its total denial." *Bounds v. Smith, supra*, 825. After securing and reasonably compensating willing judges and willing prosecutors, may the State, then, lessen costs of maintaining a tripartite criminal justice system by conscripting counsel for accused indigents? And not compensate them? May it meet costs of protecting constitutional rights of one group by compelling another into unpaid servitude? By expropriating property of another? Does the obligation to affirmatively protect constitutional rights of one group authorize States to do so by use of means

otherwise unconstitutional against another group? May unwilling physicians be required to treat prisoners? Without compensation? Permanently? Architects and engineers to pay for prisoners' housing? Grocers their food? Ad infinitum?

Not only does Alabama lack legitimate interest in methods used to create "unjustifiable" "plight" for lawyers. Such methods, if they do not thwart, cannot accomplish the obligation Alabama is bound to meet — effective representation of indigents.

An estimated

> " . . . 70 million citizens of this country do not have an income sufficient to be able to retain their own attorney should they be accused of a criminal violation." Amer. Bar Assn. Conference on Legal Needs, cited in *Draft Discussion Proposal of the Amer. Bar Assn. Standing Committee on Legal Aid and Indigent Defendants, supra*, 14.

Of survey-found felony (1,707,600) and non-traffic misdemeanor (6,932,100) arrests in 1971, a conservatively indicated 698,783 adult felony defendants, 2,710,821 non-traffic adult misdemeanor defendants and 673,853 juveniles (a total of over 4,000,000) required public representation at trial court level. Nat'l Legal Aid and Defender Assn, *The Other Face of Justice*, Tables 107, 108, 71-71. 1971 indigency rate in felony cases was conservatively indicated at 65%, misdemeanor cases at

47%. *Ibid.*, Table 117, 83. (Nat'l Conference of Commissioners on uniform state laws, *Uniform Rules of Criminal Procedure*, Rule 321(b) Comment, 70 (1974), estimates 10% of misdemeanor defendants and 60%-65% felony defendants, meet indigency standards.)

Indigency rate and number of cases involved in Calhoun County, Alabama, were obtained by method used in *The Other Face of Justice, supra.* Indigency rate in adult felony and misdemeanor cases came from Judges involved, a type source found " . . . quite knowledgeable about the rate of indigency for the types of offenses they handled." *Ibid.*, 82. Indigency rate in juvenile cases was obtained from a source also used in the survey when judicial response was lacking, lawyers representing such juveniles. *Ibid.*, 82. Approximately 380 of 400 (95%) adult indigent felony defendants had appointed counsel in 1977. "Approximately half" of 1,459 non-traffic misdemeanor defendants had appointed counsel in 11½ months of 1977. Approximately two-thirds to three-fourths of 1,286 juveniles had assigned counsel, excluding civil cases.

Gideon v. Wainwright, supra, and its succeeding line of cases have thus meant vast, new burdens, beyond any traditional unpaid appointive framework, and are the proper responsibility of government. *Smith v. State, supra; State ex rel. Partain v. Oakley, supra; Bradshaw v. Ball, supra; State v. Green, supra; State v. Rush, supra.* The State itself, with relatively unlimited resources, has found the burdens too costly for comfort. The practicing bar

has relatively only microscopic financial ability to meet such costs. If discomforting to the State, such costs are ruinous and inpossible for practicing attorneys.

Not all practicing attorneys otherwise do trial work. Not all otherwise practice juvenile or criminal law. Few, if any, willingly do so under State compulsion. Those facts in combination with extent of ongoing burdens and lack of reasonable support cannot do less than severely restrict and chill efforts of a generally conscripted bar. Support extended fails to cover attributable office expense (Jud., Cir.Ct., p. 46a, *infra*) or any other need, except a transcript on appeal.

> "It has been repeatedly held (in Alabama) that a denial of funds to pay defense experts for investigators and the assistance of experts does not amount to a deprivation of constitutional rights. (citations omitted)",

including cases where the defendant is sentenced to death. *Donald Thigpen v. State* (of Alabama), Ala. Ct. of Crim. Appls., 6 Div. 938, 1979; pending on application for rehearing, p. 53a, *infra.*

Viewed separately or in unison, conscription of and lack of financial support provided Alabama lawyers for indigent defense preclude effective aid. The State's duty to indigents

> " . . . is not discharged by an assignment at such time or under such circumstances as to

> preclude the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

The "unjustifiable" "plight" imposed upon lawyers by Alabama's methods is at least equaled by the plight thus imposed upon indigents. Its conscriptive system and token support, with primary emphasis on keeping the State's costs down, withholds from indigents the right the State is supposed to secure — effective legal assistance.

Harm does not stop with lawyers and indigents.

> "The proper performance of the defense function is (thus) as vital to the health of the ('criminal justice') system as the performance of the prosecuting and adjudicatory functions." *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice*, 10-11 (1963).

Adequate support for indigent representation is also required by society's interest in a system both effective and consistent with principles of individual freedom and human dignity. Such support is not an act of benevolence or a gratuity. Society's selection of an adversarial mode of dispute handling means the public interest requires (willing) advocates on both sides be afforded the basic tools with which to present viable argument.

Quoting dicta not acted on in *State v. Rush, supra*, a decision enunciating principles and results it rejected, the Alabama Supreme Court indicated three substantive reasons for concluding effective representation is not denied by withholding any and all financial support:

1. " 'A lawyer needs no motivation beyond his *sense of duty* and pride.' " (Op., S.Ct., Ala., p. 4a, *infra*.
2. " 'Moreover, few cases really turn upon the skill of the advocate.' " *Ibid.*, p. 5a, *infra*.
3. " 'Further, illogical though it may be, judges tend to have a larger sense of responsibility for the performance of lawyers they assign than for the performance of counsel privately retained, and to the extent that this is true, there may be an advantage for the indigent accused.' " *Ibid.*, p. 5a, *infra*.

To the first, appellants suggest glory of service dims in inverse proportion to demands made upon time, resources and independence of lawyers. Moreover, if such duty and pride secured effective representation, *Powell v. Alabama, supra, Gideon v. Wainwright, supra*, and other such decisions would have been unlikely.

To the second, validity was found lacking in *Gideon v. Wainwright, supra*.

To the third, *Powell v. Alabama, supra,* repudiated the same concept:

> "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? . . . He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." *Ibid.*, 61.

It added, in Footnote 1, that

> "The following (language) is both interesting and instructive:
>
> 'The flimsy pretence, that the court are to be counsel for the prisoner will only heighten our indignation at the practice; for it is apparent to the least consideration, that a court can never furnish a person accused of a crime with the advice, and assistance to make his defence . . . It seems by the ancient practice, that whenever a person was accused of a crime, every expedient was adopted to convict him and every privilege denied him, to prove his innocence.' " *Ibid.*, 62.

Alabama has imposed its §15-12-21 through §15-12-23 to subject appellants to peonage, deprive them of their liberty and property, deny them equal protection

of the laws, and compel their unwilling participation in depriving indigents of effective representation. Absence of legitimate interest in doing so adds substantially to claims here made.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

GUY SPARKS,
Appellant, pro se
Attorney
409 Commercial Bank Bldg.
Anniston, Alabama 36201
Telephone (205) 237-5711

RICHARD B. EMERSON
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586

Counsel for Appellant,
Calhoun County, Alabama,
Bar Association

June ____, 1979

APPENDIX

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1978-79

77-667 and 77-687

Ex parte Guy Sparks and the
Calhoun County, Alabama, Bar
Association, Etc., Petitioners

Petition for Writ of Mandamus or Appeal

(In re: Guy Sparks, Attorney at Law v.
Robert M. Parker, Presiding Judge,
7th Circuit, State of Alabama)

[Filed: Feb. 9, 1979]

BLOODWORTH, JUSTICE.

Petitioners appellants seek a writ of mandamus requiring Judge Robert M. Parker, Presiding Judge of the Seventh Judicial Circuit, to vacate, modify or set aside his order of December 27, 1977, establishing an indigent defense system for the circuit and requiring him to vacate his order of June 28, 1978, denying appellants' motion to vacate the original order, or, in the alternative, an appeal of the June 28, 1978, order denying the motion to vacate the original order.

Pursuant to §§15-12-2 and 15-12-3, Code of 1975, the order of December 27, 1977, was entered by Judge Parker with the advice and consent of the Indigent Defense Commission of the Seventh Judicial Circuit of Alabama and after consultation with the Indigent Defense Committee of the Calhoun County Bar Association. Under the indigent defense system instituted by the court, it was ordered that the "team system" be utilized for indigent felony appointments. Fifty-two eligible Calhoun County attorneys were appointed to four teams, each team consisting of thirteen attorneys and each team being eligible for appointment during three months of each year. In misdemeanor and juvenile cases, the order provided that attorneys would be appointed alphabetically.

In essence, appellants are challenging the orders establishing the indigent defense system in Calhoun County, seeking to have this Court determine that §15-12-21 through §15-12-23, Code of 1975, are unconstitutional. They argue that by compelling the service of court appointed attorneys for the compensation provided by these sections, these provisions of Alabama law are unconstitutional. (Sections 15-12-21 through 15-12-23 are attached as Appendix A.)

The first issue is whether mandamus or appeal is proper. We conclude that the proper procedure for review of the order below is appeal. Judge Parker issued the December 1977 order to fulfill a clear legal duty imposed upon him by §§15-12-2 and 15-12-3 to establish and administer an indigent defense system. Although

mandamus will lie where there has been as abuse of discretion to compel the proper exercise thereof [*Foshee v. State*, 210 Ala. 155, 97 So. 565 (1923), *Ex parte Morrow*, 259 Ala. 250, 66 So.2d 130 (1953), *East v. Todd*, 284 Ala. 495, 226 So.2d 153 (1969)], the system established under the December order appears on its face to be fair and reasonable and cannot be characterized as arbitrary or capricious. Therefore, since the order was made within the statutory authority and within the judge's discretion, mandamus will not lie but appeal is the proper remedy.

The second issue is whether the constitutional rights of indigent defendants to adequate representation are infringed by Judge Parker's order establishing an indigent defense system as authorized by the laws of this state. In presenting this claim, appellants assert that if attorneys are underpaid, they cannot satisfactorily perform the constitutional guarantee of right to counsel. However, no facts or data are shown in the record in support of this contention. Moreover, Judge Parker indicated in his June 28, 1978, order that the trial court "has not observed any great disparity between appointed and retained counsel" and notes that "[t]he same attorneys that are appointed are also the ones that are retained." Addressing a similar contention, the New Jersey court made the following observations in *State v. Rush*, 46 N.J. 399, 405-407, 217 A.2d 441, 444-445 (1966):

> "As to the right of an accused, appellant contends that counsel, if unpaid, cannot by his

performance satisfy the constitutional guarantee of the right to the aid of counsel. We know of no data to support a claim that an assigned attorney fails or shirks in the least the full measure of an attorney's obligation to a client. Our own experience, both at the bar and on the bench, runs the other way. A lawyer needs no motivation beyond his *sense of duty* and his *pride*.

"Nor can it be said that assigned counsel are less qualified than counsel privately retained. As in other callings, some men acquire reputations for excellence. In numbers they are few, and sometimes it is not clear why fortune has chosen them alone. It is understandable that a defendant will seek a lawyer of wide repute if he can afford him, but of course the Constitution does not assure every man, indigent or not, that only a leader of the bar will speak for him. Even the State cannot command such representation; most criminal cases are prosecuted by young men who have yet to be acclaimed but who are not in the least unequal to their responsibility on that account. Nor does preeminence at the bar necessarily bespeak special experience in criminal matters. In the State courts, criminal work is not too rewarding financially. Very few specialize in that area, and overall the well known lawyers have had but sporadic exposure to it.

"Nor is prior experience in criminal matters essential. The law is a vast field and no man is in command of all of it. Lawyers, as do judges, move from scene to scene absorbing the special features of each. A capacity to that end goes to the essence of the practice of law. A lawyer's training equips him for it, and his every experience sharpens that skill. And although a new scene may demand a greater initial effort, the newcomer may well bring a zeal and a freshness long lost to a tired or comfortable expert.

"Moreover, few cases really turn upon the skill of the advocate. The facts and the applicable law are quite compelling, and a lawyer who has both on his side will do well against anyone. No doubt a small number of cases are lost through lack of skill or poor preparation, but while the legal profession, like all others, suffers to a degree from the inept and the indolent, the phenomenon cannot be said to be related to a system of assignment of counsel. Further, illogical though it may be, judges tend to have a larger sense of responsibility for the performance of lawyers they assign than for the performance of counsel privately retained, and to the extent that this is true, there may be an advantage for the indigent accused."

We are in full accord with these views. In that case,

although the New Jersey Supreme Court determined for policy reasons that members of the bar would not be required to discharge the state's obligation to provide indigent defendants with counsel, the New Jersey court did not find their system of assignment unconstitutional, holding, viz:

> "We are satisfied our system of assignment yields representation equal to that obtained by defendants who retain their own counsel. This is not to say that another approach would not be more desirable. Rather our point is that what we have meets the constitutional demand, and to recur to the precise point counsel here seeks to make, we are satisfied that our assignment system does not fall short because assigned counsel are *unpaid*." (Footnote omitted.) (Emphasis supplied.)

The third issue raised is whether the indigent defense system violates the constitutional rights of counsel appointed to defend indigents accused of crimes in that it contravenes Amendment 328 (6.10) of the Alabama Constitution, requires the provision of services without just compensation [Ala. Const., Art. I, §§6, 13, 23; U.S. Const., 5th and 14th Amendments], compels involuntary servitude [Ala. Const., Art. I, §32; U. S. Const., 13th Amendment], and violates constitutional guarantees of equal protection [U. S. Const., 14th Amendment].

We now proceed to discuss these issues. Appellants contend that the indigent defense system contravenes Amendment 328 (6.10) of the Alabama Constitution of 1901 which states in part:

> "Adequate and reasonable financing for the entire unified judicial system shall be provided. Adequate and reasonable appropriations shall be made by the legislature for the entire unified judicial system, exclusive of probate and municipal courts."

Appellants argue that because the legislature has not provided the "adequate and reasonable financing" specified, attorneys should therefore be relieved of the duty to provide representation for indigent defendants. In *Morgan County Commission v. Powell*, 292 Ala. 300, 293 So.2d 830 (1974), this Court reiterated the principle of the separation of powers of government into three branches with separate functions, holding:

> "Within their respective spheres each branch of government is supreme. State v. Stone, 224 Ala. 234, 139 So. 328. Judicial power and legislative power are coordinate, and neither can encroach upon the other. Ex parte Huguley Water System, et al., 282 Ala. 633, 213 So.2d 799. The authority to determine the amount of appropriations necessary for the performance of the essential functions of government is vested fully and exclusively

> in the legislature. Abramson v. Hard, 229 Ala. 2, 155 So. 590. Section 72, Alabama Constitution of 1901, provides: 'No money shall be paid out of the treasury except upon appropriation made by law * * *.' "

It is therefore not within the sphere of the judicial branch to determine what appropriations are to be made although, of course, it would be within our purview to determine if the appropriations made are "adequate and reasonable" for the unified judicial system or so inadequate as to constitute the taking of property (services) without due process of law in the context of this case. We do not find such to be the case on this appeal.

Turning now to the other constitutional claims advanced by appellants concerning the rights of appointed counsel under the system set up by Judge Parker's order, it is helpful to examine briefly the history of the obligation of the attorney to represent indigents upon order of the court.

Representation of indigents upon court order is an ancient tradition of the legal profession, dating back to the fifteenth century in England and to pre-Revolutionary America. Counsel appointed to represent indigents have often received nothing for their services and have rarely received more than statutory fees which seldom adequately compensate a lawyer for even his expenditure of time, much less the value of his professional skill and attention.

In England, the obligation of the lawyer to serve upon court assignment apparently developed as a matter of common law. It was not until 1695 that there developed a statutory recognition of this obligation when a statute was passed requiring the courts to appoint counsel upon the request of a person accused of treason. 7 and 8 W.3, c.3, s.1 (1695).

In colonial America, however, there appears to have been a more extensive statutory recognition of the obligation of counsel to represent indigents upon court order. Several statutes were passed requiring the assignment of counsel upon request of accused persons unable to retain counsel; these statutes presupposed the existence of an obligation on the part of attorneys to serve when assigned. Thus, a Pennsylvania statute of 1718 provides for assignment of counsel in a large number of capital crimes. 3 Statutes at Large of Pennsylvania 1712-1724, pp. 199, 201 (Busch, 1896). See *Commonwealth ex rel. McGlinn v. Smith*, 344 Pa. 41, 45 n. 1, 24 A.2d 1, 3 n. 1 (1942). A Delaware statute of 1709 and a South Carolina statute of 1731 provided for assignment of counsel in the case of any capital offense — a category which included many more offenses than it does today. See Beaney, Right to Counsel in American Courts 16-17 (1955).

After the Revolutionary War, there was additional statutory, as well as common law, recognition that counsel might be ordered to represent indigent accused persons. A New Jersey statute of 1795 required

the courts in all cases of indictment to assign counsel to persons not able to procure counsel. See Beaney, op. cit, supra at 18-22. Finally, federal statutory recognition of the obligation of counsel to serve when assigned came in 1790, when, following the English act a hundred years before, Congress passed a statute requiring assignment of counsel at the request of any person accused of treason or other capital crime. 1 Stat. 118 (1790).

In addition to the ancient common law and statutory recognition of the obligation of attorneys to serve indigents, for a limited and often inadequate compensation, the great majority of courts which have passed on the question have denied claims of appointed counsel for nonstatutory just compensation, reaffirming the principle that representation of indigents under a court order without fee is a traditional obligation of the bar and therefore a condition under which lawyers are licensed to practice as officers of the court. See *Posey & Tompkins v. Mobile County*, 50 Ala. 6 (1873) and 21 ALR 3d 819.

Therefore, although the statutory compensation which exists in most states usually contains limitations which in most cases prevent a lawyer from receiving what his time is worth, constitutional standards of just compensation have generally been found inapplicable. A Fifth Amendment "taking" of property does not occur when the state simply requires an individual to fulfill a commitment he has made. *Kunhardt & Co. v. United States*, 266 U.S. 537, 45 S. Ct. 158, 69 L. Ed. 428 (1925); *Hurtado v. United States*, 410 U.S. 578, 35 L. Ed. 2d 508, 93 S. Ct. 1157 (1973). An applicant for admission to practice law may rightfully be deemed to be cognizant of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order.

In *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 65, 77 L. Ed. 158, 172 (1932), the United States Supreme Court found that attorneys were obligated to accept compulsory appointments to defend indigent defendants, stating:

> "Attorneys are officers of the court, and are bound to render service when required by such appointment."

Reinforcing this view of the lawyer's obligation to represent indigent defendants is the unique position of the Alabama Bar Association and the Board of Bar Commissioners as this Court pointed out in *Wright v. Turner*, 351 So. 2d 1, 4 (Ala. 1977):

> "Members of the Board of Bar Commissioners do have some functions which derive directly from legislative enactments. See Tit. 46, §25, Code of Alabama 1940. It is clear, however, from the terms of the Code

that their duties are, for the most part, dependent upon Supreme Court approval.

"This dependency was underscored in the opinion authored for the Court by Justice Shores in Board of Commissioners, Alabama State Bar v. State ex rel. Baxley, 295 Ala. 100, 109, 324 So.2d 256, 262 (1975): 'Although the Board (of Bar Commissioners) was created by the legislature, it was created as an arm to this court and any action by the Board is subject to review or approval by this court. The legislature has not created an entity which is not subject to control or regulation, the Board is subject to the control of this court.' "

As an "arm of the court" the Board of Bar Commissioners, and consequently the members of the Alabama State Bar as well, enjoy certain state privileges. Although the members of the Board receive neither salary nor emolument by virtue of their membership on the Board, they do receive reimbursement of actual expenses from the state and the members of the state bar benefit from the services so provided. A concomitant obligation upon the bar of this state is to furnish legal services to indigents at the statutory compensation provided in order to enable the state to discharge its duty to provide adequate representation for indigent defendants imposed upon the state by *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 733 (1963); *U.S. v. Wade*, 338 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *Miranda v. Arizona*,

384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970); *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977); *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (juveniles).

While the furnishing of services without just compensation might not be demanded of a citizen who is not an officer of the court or who does not enjoy special privileges from the state or who is not otherwise required to fulfill a commitment to the state, members of the Alabama Bar are in a unique position and, for this reason, are obligated to render their services for limited compensation.

Having traced some of the historical obligation of the attorney to represent indigents and having examined the unique position of the Alabama State Bar due to privileges enjoyed from the state, we now proceed to consider the four cases on which appellant places heavy reliance, namely: *State ex rel. Partain v. Oakley*, 227 S.E.2d 314 (W. Va. 1976); *State v. Green*, 470 S.W.2d 471 (Mo. 1971); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966); and *Smith v. State*, 394 A.2d 834 (N.H. 1978).

At the outset we note that in none of the first three

cases did the highest appellate courts of either West Virginia, Missouri, or New Jersey hold that the asserted constitutional rights had been violated. Instead, in each instance, for policy considerations, the courts ordered that, effective approximately one year from the date of each opinion, attorneys should be relieved of the duty of accepting compulsory appointments to represent indigents if the respective state legislatures failed to provide assistance either by providing public defenders or by providing additional compensation. In *Smith*, the New Hampshire Supreme Court (in an opinion authored by Justice Grimes) specifically held that the people of New Hampshire decided that the burden of paying the cost of indigent defense should be borne by the people as witnessed by their adoption of the constitutional provision which provides in pertinent part, viz:

> ". . . Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown . . . ."

The constitutional convention's history of that provision shows it was adopted to place the cost on the State and to relieve the attorney of his historical obligation.

Moreover, in the instant case, there is insufficient evidence of record to reach a result similar to the courts' decisions in *Oakley*, *Rush*, and *Green*.

In *State ex rel. Partain v. Oakley*, for example, much more evidence was furnished the West Virginia court concerning the burden imposed on the attorneys of that state. The West Virginia Bar Association supplied data descriptive of the caseload per lawyer by appointment in the various circuits of that state. The West Virginia court, based on that information, found that those attorneys were not suffering an oppressive loss of income by virtue of their representation of indigents but, because the situation was rapidly approaching such a state, the court stated that an order would subsequently be entered relieving attorneys from their duty to represent indigents.

Comparable information to that on which the West Virginia court based its policy decision is not of record in the present case. The record contains only affidavits of Calhoun County attorneys, most of which state only the percentage of time each attorney spent on indigent cases making no reference to caseload or actual hours worked on such cases.

This Court appreciates and is most sensitive to the plight of the attorneys of Calhoun County, shared by their brother and sister attorneys throughout the state, and finds that the failure of the legislature to provide adequate funds to compensate attorneys to the extent of the true value of their services is unjustifiable. Nevertheless, the statutes in question do not infringe upon the constitutional rights of appellants for the reasons we have given and the June 28, 1978, order denying appellants' motion to vacate,

modify or set aside the order establishing the circuit's indigent defense system is affirmed.

MANDAMUS DENIED. APPEAL AFFIRMED.

All the Justices concur.

[Filed: Mar. 9, 1979]

On Rehearing

APPLICATION FOR REHEARING OVERRULED.

Torbert, C. J., Bloodworth, Jones, Almon, Shores, Embry, and Beatty, JJ., concur.

Maddox and Faulkner, JJ., dissent.

MADDOX, JUSTICE (Dissenting).

After further reflection, I am convinced the majority opinion is wrong. I hereby withdraw my concurrence with it.

The majority's opinion is premised upon the erroneous concept "that representation of indigents under a court order without fee is a traditional obligation of the Bar and therefore a condition under which lawyers are licensed to practice as officers of the court." There may be an "obligation of attorneys to serve indigents," but, at most, it is only a moral obligation, not a

legal one, unless the attorney is directed to perform such services by a court. If so directed, however, are attorneys required to serve without compensation? I think not. In any event, several attorneys have challenged the statement that they agreed to perform services free of charge as a condition of their licensure. They are now joined by the Alabama State Bar. The Alabama State Bar, in an amicus curiae brief in support of the application for rehearing, states:

> "As was stated in the case of *County of Dane* v. *Smith*, Supreme Court of Wisconsin (1861), 'We do not believe that the legislature have the power generally to say to the physician, the surgeon, the lawyer, the farmer, or anyone else, that he shall render this or that services, or perform this or that act in the line of his profession or business without remuneration.' "

I agree. Can the state appropriate the services of a physician, a surgeon, a farmer or anyone else, without compensation? The answer is obviously in the negative. Neither should attorneys be forced to perform services as a public defender without just compensation.

I would grant rehearing.

Faulkner, J., concurs.

APPENDIX A

§ *15-12-21. Appointment and compensation of counsel — Trial court.*

(a) If it appears to the trial court that such defendant is entitled to counsel, that such defendant does not expressly waive the right to assistance of counsel and that such defendant is not able financially or otherwise to obtain the assistance of counsel, the court shall appoint counsel to represent and assist the defendant; and it shall be the duty of such appointed counsel, as an officer of the court and as a member of the bar, to represent and assist said defendant.

(b) Counsel appointed in such cases shall be entitled to receive for their services a fee to be fixed by the trial court. The amount of such fee shall be based on the number of hours spent by the attorney in working on such case and shall be computed at the rate of $20.00 per hour for time expended in court and $10.00 per hour for the time reasonably expended out of court in the preparation of such case. Such counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense. The total fees and expenses to any one attorney in any one case, including fees for services rendered in preliminary hearing and in ancillary proceedings, shall not, however, exceed $500.00.

(c) Within a reasonable time after the conclusion of the trial or ruling on a motion for a new trial or after an

acquittal or other judgment disposing of the case, counsel shall submit to the trial court a bill for services rendered, not to exceed the amount provided in subsection (b) of this section, and such bill, if approved by the trial court, shall be submitted by the clerk of the court to the state comptroller for audit and allowance and, if approved by the comptroller, shall be forwarded to the state treasurer for payment. (Acts 1963, No. 526, p. 1136, §§ 2, 3; Acts 1971, No. 2420, p. 3851.)

§ *15-12-22. Same — Appeals.*

(a) In all criminal cases wherein a defendant has been convicted of a serious offense in which an appeal lies directly to the supreme court or court of criminal appeals and the defendant expresses his desire to appeal such conviction, the court shall cause to be entered upon its minutes a recital of notice of appeal, and the court shall then ascertain and make findings in reference to the appeal concerning those items listed in section 15-12-20.

(b) If it appears that the defendant desires to appeal and is unable financially or otherwise to obtain the assistance of counsel on appeal and the defendant expresses the desire for assistance of counsel, the trial court shall appoint counsel to represent and assist the defendant on appeal. The presiding judge of the court to which the appeal is taken shall have authority to appoint counsel in the event the trial court fails to appoint and in the event it becomes necessary to further provide for counsel. It shall be the duty of such counsel,

as an officer of the court and as a member of the bar, to represent and assist such defendant in the appeal.

(c) Counsel appointed for the appeal shall be entitled to receive for their services a fee to be fixed by the appellate court. The amount of such fee shall be based on the number of hours spent by the counsel in working on such appeal and be computed at the rate of $20.00 per hour for time expended in court and $10.00 per hour for time reasonably expended out of court in the preparation of such appeal. Such counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in preparing and handling such appeal. The total fees and expenses awarded to any one attorney in any one case, including fees on the trial of the case in the lower court, on the appeal and in any ancillary proceedings, shall not, however, exceed $1,000.00.

(d) Within a reasonable time after the disposition of the appeal, counsel shall submit to the appellate court a bill for services rendered, not to exceed the amount provided in subsection (c) of this section, and such bill, when approved by the presiding judge or chief justice of the appellate court, shall be submitted by the clerk of the appellate court to the state comptroller for audit and allowance and, if approved by the comptroller, forwarded to the state treasurer for payment. (Acts 1963, No. 526, p. 1136, §§ 4, 5; Acts 1971, No. 2420, p. 3851.)

§ *15-12-23. Same — Postconviction proceedings.*

(a) In proceedings filed in the district or circuit court involving the life and liberty of those charged with or convicted of serious criminal offenses, including proceedings for habeas corpus and coram nobis or other postconviction remedies, and in appeals, post-trial motions in such proceedings, the trial or presiding judge or chief justice of the court in which such proceedings may be commenced or pending may appoint counsel to represent and assist those persons so charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of such judge to assert or protect the rights of such person.

(b) It shall be the duty of such counsel as provided in subsection (a) of this section to represent and assist the person in such proceeding.

(c) The counsel appointed in such proceedings shall be entitled to receive for his services a fee to be fixed by the judge appointing him. The amount of such fee shall be based on the number of hours spent by counsel in working on such proceedings and be computed at the rate of $20.00 per hour for time expended in court and $10.00 per hour for time reasonably expended in preparation of such proceedings; provided, that the total amount of compensation to counsel for such proceedings shall not exceed $300.00, nor shall the total amount awarded to any one attorney for any one

case, including fees on the trial of the case in the lower court, on the appeal and in any ancillary proceedings, exceed $1,000.00.

(d) Claim for such fee shall be submitted, approved and paid in the same manner as provided in subsection (d) of section 15-12-22. (Acts 1963, No. 526, p. 1136, § 7; Acts 1971, No. 2420, p. 3851.)

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 9 day of March, 1979.

/s/ J. O. SENTELL
Clerk,
Supreme Court of Alabama

FEBRUARY 9, 1979

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1978-79

77-667
77-687

Ex Parte: Guy Sparks, et al.
PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, APPEAL
(In Re: Guy Sparks, Attorney at Law vs. Robert M. Parker, Presiding Judge, 7th Circuit, State of Alabama)

ORDER

This cause having been duly argued and submitted on the petition of Guy Sparks and the Calhoun County Bar Association for a writ of mandamus, or in the alternative, appeal from the Circuit Court of Calhoun County, it is considered that mandamus will not lie, and that appeal is the proper remedy.

IT IS, THEREFORE, ORDERED that the petition for writ of mandamus be, and the same is hereby, denied.

IT IS FURTHER ORDERED that the order of the circuit court be, and the same is hereby, affirmed in all things.

IT IS FURTHER ORDERED that the petitioners, Guy Sparks and the Calhoun County Bar Association, pay the costs of this proceeding on the petition for writ of mandamus in this Court, for which costs let execution issue.

IT IS FURTHER ORDERED that the appellants, Guy

Sparks and the Calhoun County Bar Association, and Richard B. Emerson, J. M. Sides, John W. Norton, and Gus Colvin, sureties for the costs of appeal, pay the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which costs let execution issue.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 28th day of March 1979.

/s/ J. O. SENTELL
Clerk,
Supreme Court of Alabama

ARTICLE 1.

GENERAL PROVISIONS.

§ *15-12-1. Definitions.*

When used in this chapter, the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise:

(1) INDIGENT DEFENDANT. Any person involved in a criminal or juvenile proceed-

ing in the trial or appellate courts of the state for which proceeding representation by counsel is constitutionally required and who under oath or affirmation states that he is unable to pay for his defense and who is found by the court to be financially unable to pay for his defense.

(2) APPOINTED COUNSEL. Any attorney licensed to practice law in the state of Alabama who is appointed by the court to represent an indigent defendant as defined in subdivision (1) of this section.

(3) PUBLIC DEFENDER. Any attorney licensed to practice law in the state of Alabama who receives a salary for representing indigent defendants as defined in subdivision (1) of this section.

(4) INDIGENT DEFENSE SYSTEM. Any method or mixture of methods for providing legal representation to indigent defendants, including use of appointed counsel, use of public defenders or any alternative method meeting constitutional requirements. (Acts 1975, No. 1205, § 9-101.)

§ *15-12-2. Determination as to indigent defense systems to be used in circuit, district and municipal courts.*

(a) The indigent defense system in the circuit and

district court of a county shall be determined as follows:

(1) In circuits with two circuit judges or less, the presiding judge of the circuit court, with the advice and consent of the indigent defense commission, shall determine the indigent defense system to be used in each county of the circuit; and

(2) In circuits with three or more circuit judges, a majority of the circuit judges, with the advice and consent of the indigent defense commission, shall determine the indigent defense system to be used in each county of the circuit.

(b) The indigent defense system in municipal courts shall be determined by the governing body of the municipality. Such system shall be subject to the administrative supervision of the presiding circuit judge. (Acts 1975, No. 1205, § 9-105.)

§ 15-12-3. *Presiding circuit judges to administer indigent defense systems within circuits; adoption of rules for effectuation of systems by circuit courts.*

Within each judicial circuit the presiding circuit judge shall administer the indigent defense system pursuant to rule of the supreme court.

Circuit courts may adopt rules, not in conflict with rules of the supreme court, to effectuate a system of indigent defense. (Acts 1975, No. 1205, § 9-103.)

§ 15-12-4. *Circuit indigent defense commissions.*

(a) *Creation.* — In each judicial circuit, the presiding circuit judge shall appoint an indigent defense commission.

(b) *Composition; qualifications, appointment, term of office and removal of members; vacancies.* — The indigent defense commission shall be composed of five members who are residents of the judicial circuit in which they are appointed. There shall be two members who are attorneys licensed to practice law in Alabama, one member who is a member of a county commission within the circuit, one member who is the mayor or a member of the governing body of a municipality within the circuit and one member who is a nonlawyer citizen. Each member shall serve for a term of six years from the date of appointment, unless removed for cause by the presiding circuit judge after notice and a hearing. Vacancies on the commission shall be filled by the presiding judge.

(c) *Compensation and expenses of members.* — Members of the indigent defense commission shall serve without compensation; except, that necessary travel expenses in connection with commission business shall be paid by the state in the same manner as for state employees generally.

(d) *Meetings generally; quorum; chairman.* — The indigent defense commission shall meet at least once annually and shall meet whenever so requested by the presiding circuit judge. Three members shall constitute a quorum for conducting business. One member shall be designated a chairman by majority vote of the members.

(e) *Powers and duties.* — The indigent defense commission shall perform the following duties and have the following powers:

(1) It shall advise the presiding circuit judge on the indigent defense system to be utilized in each county of the circuit;

(2) It shall advise the presiding circuit judge on the operation and administration of indigent defense systems within the circuit; and

(3) It shall select the public defender by majority vote, if a public defender system is established within the circuit, determine the budget for the public defender and supervise the operation of the public defender office. It may remove the public defender for cause after notice and a hearing. (Acts 1975, No. 1205, § 9-104.)

§ *15-12-5. Determination of indigency and provision of defense counsel generally.*

(a) *Judicial role in determining indigency.* — The trial judge first having cognizance of a criminal or juvenile proceeding in his court shall determine if an accused person or petitioner for postconviction relief is an indigent defendant. Upon appeal from a trial court to the state appellate courts, the trial judge or the presiding circuit judge shall determine if the appellant is an indigent defendant. In any proceeding initiated originally in a state appellate court or in any case appealed to a state appellate court without a determination of indigency, the presiding judge or chief justice of the appellate court shall determine if the appellant or petitioner is an indigent defendant.

(b) *Criteria for determining indigency.* — In determining indigency, the judge shall recognize ability to pay as a variable depending on the nature, extent and liquidity of assets, the disposable net income of the defendant, the nature of the offense, the effort and skill required to gather pertinent information and the length and complexity of the proceedings.

(c) *Investigation of indigency.* — In determining the fact of indigency a judge may require an investigation and report by a district attorney, public defender, sheriff, probation officer or other officer of the court.

(d) *Provision of defense counsel.* — The judge making a determination of indigency shall provide legal representation for the indigent defendant. To the extent

possible, judges shall provide continuity in legal representation. (Acts 1975, No. 1205, § 9-102.)

§ *15-12-6. Compensation of appointed counsel generally.*

Compensation of counsel appointed to represent indigent defendants shall be paid by the state in such amounts as otherwise provided by law. The procedure for approval and payment for such services shall be as provided by law or rule as may be promulgated by the supreme court. (Acts 1975, No. 1205, § 9-107.)

ARTICLE 2.

APPOINTED COUNSEL.

§ *15-12-20. Matters to be ascertained by trial judges as to representation of defendants prior to arraignment.*

In all criminal cases in any court of this state created by authority of the Constitution of 1901, as amended, when a defendant is entitled to counsel as provided by law, the trial judge shall before arraignment ascertain from the accused, or otherwise:

(1) Whether or not the defendant has arranged to be represented by counsel;

(2) Whether or not the defendant desires the assistance of counsel; and

(3) Whether or not the defendant is able financially or otherwise to obtain the assistance of counsel. (Acts 1963, No. 526, p.

1136, § 1; Acts 1971, No. 2420, p. 3851; Acts 1975, No. 1205, § 9-108.)

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Thirteenth Amendment, Section 1, United States Constitution:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have

been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Fourteenth Amendment, Section 1, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE SEVENTH JUDICIAL
CIRCUIT OF ALABAMA

ORDER
Teams of Attys. for Indigent Felony
& Misdemeanor Cases in UJS Courts

STATE OF ALABAMA)
CALHOUN COUNTY)

The Court having met with the Calhoun County Bar Association Committee, and it being agreed at that time that the "team system" for indigent felony appointments would be used with each team receiving appointments for three months and that an alphabetical list shall be used for indigent misdemeanor appointments and that an alphabetical list starting from the end of the alphabet shall be used for Juvenile Division of District Court;

It is, therefore, ORDERED that the following teams and alphabetical list shall be used for indigent appointments pending further order of this Court.

DONE and ORDERED this 27th day of December, 1977.

/s/ ROBERT M. PARKER
Presiding Circuit Judge

Filed: Dec. 27, 1977
/s/ FORREST DOBBINS, Clerk
Recorded in State M.B. 26, Page 251

FELONIES

TEAM SYSTEM #1

1. Fred Ray Lybrand
2. Charles L. Parks
3. Jack Wilson
4. Jeff Deen
5. H. Darden Williams
6. John R. Phillips
7. H. R. Burnham
8. Richard B. Emerson
9. Danny Morris
10. Charles Thomason
11. Guy Sparks

12. James M. Campbell
13. Gary Smallwood

FELONIES

TEAM SYSTEM #2

1. J. M. Sides
2. Robert B. Propst
3. Ed Isom
4. H. Merrill Vardaman
5. G. Coke Williams
6. Gene Rutledge
7. Marvin H. Watson, Jr.
8. James L. Klinefelter
9. William S. Halsey
10. James Hubbard
11. James Standridge
12. Grant Parris
13. George Stevens

FELONIES

TEAM SYSTEM #3

1. Jerry Oglesby
2. Thomas Dick
3. William Jackson
4. John Vardaman
5. John Norton

6. Carey Smith
7. Wayne Love
8. John C. Thomason
9. Joe Whittington
10. Todd Caldwell
11. Henry Agee
12. J. M. Boozer
13. James A. Mitchell

FELONIES

TEAM SYSTEM #4

1. Ed Harwell
2. James A. Main
3. Bert Taylor
4. Gus Colvin
5. Doug Ghee
6. Joe Estep
7. Donald Stewart
8. Herbert Jones
9. Richard Cater
10. Hugh Merrill
11. Gordon Bailey
12. A. W. Bolt
13. Ronnie Held

MISDEMEANORS

1. Henry Agee
2. Gordon Bailey
3. A. W. Bolt
4. J. M. Boozer
5. H. R. Burnham
6. Todd Caldwell
7. James Campbell
8. Richard Cater
9. Gus Colvin
10. Jeff Deen
11. Thomas Dick
12. Richard Emerson
13. Joe Estep
14. Douglas Ghee
15. Wm. S. Halsey
16. Ed W. Harwell
17. Ronnie Held
18. James S. Hubbard
19. Ed Isom
20. Wm. H. Jackson
21. Herbert Jones
22. J. L. Klinefelter
23. Wayne Love
24. Fred Lybrand
25. James Main
26. Hugh Merrill
27. James Mitchell
28. Danny Morris
29. John Norton
30. Jerry Oglesby
31. Grant Paris
32. Charles Parks
33. John Phillips
34. Robert B. Propst
35. Eugene Rutledge
36. J. M. Sides
37. Gary Smallwood
38. Carey Smith
39. Guy Sparks
40. James Standridge
41. George Stevens
42. Donald Stewart
43. Bert Taylor
44. Charles Thomason
45. John Thomason
46. Merrill Vardaman
47. John Vardaman
48. M. H. Watson
49. Coke Williams
50. Darden Williams
51. Jack Wilson
52. Joe Whittington

IN THE DISTRICT COURT OF
CALHOUN COUNTY, ALABAMA
JUVENILE DIVISION

ORDER

Pursuant to an order entered on December 27, 1977, by the Honorable Robert M. Parker, Presiding Circuit Judge, which perpetuated a systematic program for indigent defense in Calhoun County; and, in order to furnish the Juvenile Division of the Calhoun County District Court with attorneys on dates court is held; and, after discussion with representatives of the Calhoun County Bar Association which indicates that the following is the best method for the bar and court for providing representation for those who need it;

It is therefore ORDERED as follows:

1. That the attached list be adopted as the schedule of court dates until the end of March, 1978, for the Juvenile Division of the Calhoun County District Court.

2. That the attorneys listed on the attached list shall be available for the Juvenile Division of the Calhoun County District Court on the dates shown or provide a substitute on said date if unable to appear.

3. That said attorneys shall be present in court for any cases set for hearing on the dates they are to appear and shall be on call at other times during the regular hours of court (9:00 A.M. until 4:00 P.M.) for other matters such as detention hearings or other emergencies.

4. That a copy of this order and attached list be sent by mail to the following:

a. Honorable Robert M. Parker, Presiding Circuit Judge.

b. Marie S. Tidwell, District Court Clerk.

c. All lawyers listed on the attached list.

This the 28th day of December, 1977.

/s/ JAMES D. SLOAN, JR.
JAMES D. SLOAN, JR.
Calhoun County
District Court Judge

			Attorney
Jan	3	Tues.	Joe Whittington
Jan	4	Wed.	Darden Williams
Jan	10	Tues.	Jack Wilson
Jan	11	Wed.	Coke Williams
Jan	17	Tues.	John Vardeman
Jan	18	Wed.	M. H. Watson
Jan	24	Tues.	Merrill Vardeman

Jan	25	Wed.	John Thomason
Jan	31	Tues.	Charles Thomason
Feb	1	Wed.	Bert Taylor
Feb	8	Wed.	Donald Stewart
Feb	14	Tues.	George Stevens
Feb	15	Wed.	James Standridge
Feb	21	Tues.	Guy Sparks
Feb	22	Wed.	Carey Smith
Feb	28	Tues.	J. M. Sides
Mar	1	Wed.	Eugene Rutledge
Mar	7	Tues.	Robert B. Propst
Mar	8	Wed.	Ralph Porch
Mar	14	Tues.	Charles Parks
Mar	15	Wed.	John Phillips
Mar	21	Tues.	Grant Paris
Mar	22	Wed.	Jerry Oglesby
Mar	28	Tues.	John Norton
Mar	29	Wed.	Danny Morris

IN THE DISTRICT COURT OF
CALHOUN COUNTY, ALABAMA

ORDER

Pursuant to the plan submitted to the Court by the Calhoun County Bar Association for defense of indigents charged with Criminal offenses it is hereby ordered that:

1. The attached list is a schedule of Criminal Court dates for District Court of Calhoun County and

the schedule of Attorneys assigned for defense of indigents from January 2, 1978 through March 31, 1978.

2. That the Attorneys listed on the attached schedule be present in Court at 9:00 A.M. on Thursday morning or 1:30 P.M. Thursday afternoon on the dates scheduled or have another Attorney substitute for him on said date if unable to appear.

This 28 day of December, 1977.

/s/ JAMES D. SLOAN
James D. Sloan
Judge
District Court of
Calhoun County

CC: Honorable Robert M. Parker, Presiding Circuit Judge
Marie S. Tidwell, District Court Clerk
All Attorneys listed on Attached Schedule

DAY OF WEEK	DATE & TIME	COURTROOM	ATTORNEY
Thursday	January 5 9:00 A.M.	City of Anniston Courtroom	Fred Ray Lybrand Charles L. Parks Jack Wilson
Friday	January 6 9:00 A.M.	Courthouse Annex #2	Jeff Deen H. Darden Williams
Thursday	January 19 9:00 A.M.	City of Anniston Courtroom	John R. Phillips H. R. Burnham Danny Morris
Friday	January 20 9:00 A.M.	Courthouse Annex #2	Richard B. Emerson Charles Thomason
Thursday	February 2 9:00 A.M.	City of Anniston Courtroom	Guy Sparks James M. Campbell
Thursday	February 2 1:30 P.M.	Courthouse Annex #2	Gary Smallwood Fred Ray Lybrand
Thursday	February 9 9:00 A.M.	City of Anniston Courtroom	Charles L. Parks Jack Wilson
Thursday	February 9 1:30 P.M.	Courthouse Annex #2	Jeff Deen H. Darden Williams
Thursday	February 16 9:00 A.M.	City of Anniston Courtroom	John R. Phillips H. R. Burnham
Thursday	February 16 1:30 P.M.	Courthouse Annex #2	Richard B. Emerson Danny Morris

DAY OF WEEK	DATE & TIME	COURTROOM	ATTORNEY
Thursday	February 23 9:00 A.M.	City of Anniston Courtroom	Charles Thomason Guy Sparks
Thursday	February 23 1:30 P.M.	Courthouse Annex #2	James M. Campbell Gary Smallwood
Thursday	March 2 9:00 A.M.	City of Anniston Courtroom	Fred Ray Lybrand Charles L. Parks
Thursday	March 2 1:30 P.M.	Courthouse Annex #2	Jack Wilson Jeff Deen
Thursday	March 9 9:00 A.M.	City of Anniston Courtroom	H. Darden Williams John R. Phillips
Thursday	March 9 1:30 P.M.	Courthouse Annex #2	H. R. Burnham Richard B. Emerson
Thursday	March 16 9:00 A.M.	City of Anniston Courtroom	Danny Morris Charles Thomason
Thursday	March 16 1:30 P.M.	Courthouse Annex #2	Guy Sparks James M. Campbell
Thursday	March 23 9:00 A.M.	City of Anniston Courtroom	Gary Smallwood Fred Ray Lybrand
Thursday	March 23 1:30 P.M.	Courthouse Annex #2	Charles L. Parks Jack Wilson
Thursday	March 30 9:00 A.M.	City of Anniston Courtroom	Jeff Deen H. Darden Williams
Thursday	March 30 1:30 P.M.	Courthouse Annex #2	H. R. Burnham Richard Emerson

IN THE DISTRICT COURT OF CALHOUN COUNTY ALABAMA

ORDER

Pursuant to the plan submitted to the Court by the Calhoun County Bar Association for Defense of indigents charged with Criminal Offenses it is hereby ordered that:

1. The attached list is a schedule of Criminal Court dates of District Court of Calhoun County and the schedule of Attorneys assigned for defense of indigents from April 1, 1978 through June 30, 1978.

2. That the Attorneys listed on the attached schedule be present in Court at 9:00 A.M. on Wednesday on the dates scheduled or have another Attorney substitute for him on said date if unable to appear.

This 16 day of March, 1978.

/s/ WOODROW ALBEA
Woodrow Albea
Judge
District Court of
Calhoun County

CC: Honorable Robert M. Parker, Presiding Circuit Judge
Marie S. Tidwell, District Court Clerk
All Attorneys listed on Attached Schedule

DAY OF WEEK	DATE	COURTROOM	ATTORNEY
Wednesday	April 12	District Court Courtroom 1411 Gurnee Avenue	Robert B. Propst Eugene Rutledge
Wednesday	April 26	District Court Courtroom 1411 Gurnee Avenue	J. M. Sides Carey Smith
Wednesday	May 10	District Court Courtroom 1411 Gurnee Avenue	Guy Sparks James Standridge
Wednesday	May 24	District Court Courtroom 1411 Gurnee Avenue	George Stevens Donald Stewart
Wednesday	June 14	District Court Courtroom 1411 Gurnee Avenue	Charles Thomason Merrill Vardaman
Wednesday	June 28	District Court Courtroom 1411 Gurnee Avenue	John Thomason John Vardaman

IN THE CIRCUIT COURT OF
CALHOUN COUNTY, ALABAMA

CASE NO. CV 78-98

GUY SPARKS, Attorney at Law,
Petitioner/Movant,

versus

ROBERT M. PARKER, Presiding Judge, 7th Circuit,
State of Alabama.

This matter is submitted to the Court on the motion of Honorable F. Guy Sparks to rescind or modify the previous order of this Court establishing four "teams" of attorneys to give legal service to indigents. The Calhoun County Bar Association has intervened in this action. The Alabama State Bar has appeared and filed amicus curiae brief on behalf of movant.

In regard to the motion filed, this Court has, in liaison with the Indigent Defense Committee of the Calhoun County Bar and the Indigent Defense Commission of this Circuit, and pursuant to Title 15, Chapter 12 of the Code of Alabama, 1975, has drawn orders to try to insure the adequate defense of indigents and to spread that burden as equally as possible on the members of the Bar. Some attorneys are exempt due to ethical conflicts.

The Supreme Court of the United States has held that an indigent defendant has the constitutional right to the services of an attorney to defend and advise him. The Supreme Court of Alabama has held likewise.

The failure of a Court to appoint counsel for indigent defendants, unless he knowingly waives counsel, precludes his prosecution; and, if convicted, will void his conviction on appeal.

This doctrine has been extended from felonies to misdemeanors, to juveniles, and to custody cases where the interest of the minor may be adverse to his parents.

The cases are voluminous, the burden is heavy, the compensation is poor to non-existent.

The movant and intervenors are members of the Calhoun County Bar Association and citizens of this County, State and Country. They too are protected by the Constitution of the United States and the State of Alabama. Their time and advice are stock in trade and in which they have a property interest.

The Court is sympathetic with the plight of the appointed attorney. It has been a situation where one person had to work for another, whether he wanted to or not, and without regard whether he will get paid; and further, if he is paid some sum it is generally wholly inadequate to even cover part of his office expenses.

The general rule concerning this matter and similar situations is stated in Am Jur 2d *Courts* Section .79 n.9 (1965), 21 C.J.S. Courts S. 14 (1940), Courts have the inherent power to incur and order paid all expenses reasonably necessary to efficient operation of the Court or to performance of its judicial functions, 59 ALR 3d 569.

This rule has not been followed in Alabama; and Alabama follows a rule to the contrary. *Morgan County Commission v. Judges Newton B. Powell, R. L. Hundley and Tom B. Coggin,* 292 Ala 300, 293 So 2d 830, reaffirms the principle of separation of powers into the Executive, Judicial and Legislative branches of government, that they are co-ordinate, and neither can encroach upon the other.

In that action, the case of *Abramson v. Hand,* 229 Ala 2 was cited for upholding the authority of the legislature to determine the amount of appropriations necessary for the performance of the essential functions of government. Section 72 of the Alabama Constitution of 1901 "No money shall be paid out of the treasury except upon appropriation made by law" is also cited. In *Jetton v. Sanders,* 49 Ala App 669, 275 So 2d 349 the Governor of Alabama was unable to reduce the amount of fees set by the Legislature for indigent representation. This Court is similarly unable to appropriate monies or order appropriation of monies for defense of indigents or other purposes. In absence of statute see annotation 21 ALR 3d 819.

Section 6.10 of the State Constitution states: "Adequate and reasonable financing for the entire unified judicial system *shall* be provided. Adequate and reasonable appropriations *shall* be made by the Legislature for the entire unified judicial system, exclusive of Probate Courts and Municipal Courts." As stated in the Morgan County case, this is a constitutional priority on the legislature to adequately and reasonably finance the Court System. This priority does not exist or pertain to any other branch of government. The Courts in Alabama are dependent upon the Legislature to do its constitutional duty.

Chapter 12 of Title 15 of the 1975 Code of Alabama concerns the subject "Defense of Indigents." The movant, in his argument, states that these laws are constitutional but are unconstitutional in their application. The order of this Court contested was made in compliance with the mandate of the Legislature in Title 15, Chapter 12. After consideration, the Court is of opinion that movant is actually attacking, as unconstitutional, Title 15, Section 12-21(b), and that this has not been properly done under the law.

This Court agrees with movant that the Bar of this State has for 15 years or more borne the burden of defense of indigents. How long this situation will endure is unknown. How long must the Bar of this State suffer the financial burden of defense of indigents instead of the State? Chapter 12 of Title 15 gives several alternatives for indigent criminal defense. None have been reasonably funded or reasonably attempted. The

solution is not simple as the tax monies going to Montgomery are largely legislatively directed or earmarked and the General Fund receives only about 15 to 17 percent of said monies, yet crime and domestic relation cases are the most prevalent cases in Court. The public demands prosecution and trial of these cases; but it seems to be politically popular to subjugate the Courts to less than equal status of other departments of government, much less a co-equal branch of the government.

Until that time occurs, voluntarily or otherwise, the movant and others in the same plight are bound by the legal duties and Code of Ethics: "To support the Constitution and Laws of this State and the United States"; "Never to reject, for any consideration personal to themselves, the cause of the defenseless and oppressed"; "An attorney assigned as counsel for an indigent prisoner ought not to ask to be exempt for any light cause, and should always be a friend to the defenseless and oppressed".

In regard to appointment by the Juvenile Section of District Court, the law specifically states fees of counsel appointed by the Judge shall be paid by the County.

In regard to the claim of unequal services to indigents, this Court has failed to observe this and deems the contrary to be true. The same attorneys that are appointed are also the ones that are retained. This Court has not observed any great disparity of service between appointed or retained counsel.

In regard to the contention that uncompensated service rendered to an indigent under appointment by the Court constituted a taking of his services in violation of the Fifth Amendment, the Federal Courts have held this was not a "taking" in the Constitutional sense. *United States v. Dillon*, 346 F2d 633; *State v. Clifton*, 172 So2d 657.

This Court has written to this motion as it understands the statutes and decisions of the Courts of this State. As the law now stands, we have a dependent judiciary instead of an independent judiciary as envisioned by the founders of this Country.

If there was adequate funding of the Court System, this motion would not be in existence as volunteers would handle all indigent cases. Since this has not occurred, this Court must "appoint" attorneys or cease to be effective in the fields complained.

It is, therefore, ORDERED and ADJUDGED that the motion of F. Guy Sparks to alter or rescind the previous order of this Court be and it hereby is overruled.

Costs are hereby waived.

DONE and ORDERED this 28th day of June, 1978.

/s/ ROBERT M. PARKER
ROBERT M. PARKER
Presiding Judge
Seventh Judicial Circuit

FILED IN OFFICE 6-28, 1978
R. F. (FORREST) DOBBINS, CLERK
CIRCUIT COURT — CALHOUN COUNTY
/s/ HB

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1978-79

6 Div. 938

Donald Thigpen

versus

State

Appeal from Jefferson Circuit Court

BOOKOUT, JUDGE

Appeal from denial of writ of error coram nobis.

The appellant was convicted on May 13, 1972, for the shotgun slaying of Cassie Lee Davis. He was sentenced to death in that case. However, on appeal to this court that sentence was modified to life imprisonment due to the intervening decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Thigpen v. State*, 50 Ala.App. 176, 277 So.2d 922 (1973). No further appeal was taken.

While serving the life sentence imposed in *Thigpen I*, the appellant and a number of other prisoners escaped from Holman Prison on April 16, 1975. The next day the body of an elderly farmer was found in a deserted barn three miles from the prison. The farmer had been beaten to death with a blunt instrument and also had a "v-shaped" laceration to the skull which appeared to have been made by an ax or hatchet found at the scene.

The appellant was charged with that murder and tried under Title 14, § 319, Code of Ala. 1940, which provides for a mandatory death sentence where a prisoner is convicted of first degree murder while serving a life sentence. The appellant was duly tried, convicted, sentenced to death, and appealed to this court which affirmed the conviction. *Thigpen v. State*, Ala.Cr.App., 355 So.2d 392 (1977), affirmed, Ala., 355 So.2d 400.

Having failed to overturn the conviction and death sentence in *Thigpen II* in this court and the Alabama Supreme Court, the appellant now attempts a collateral attack on his original conviction in 1972 in *Thigpen I*.

I

The appellant contends that he was erroneously denied funds for expert witnesses and investigative services at the coram nobis hearing. He contends that his federal Sixth Amendment right to effective assistance of counsel is meaningless when his counsel is not afforded the basic tools with which to present a

viable argument. It has been repeatedly held that a denial of funds to pay defense experts for investigators and the assistance of experts does not amount to a deprivation of constitutional rights. *Harris v. State*, Ala.Cr.App., 352 So.2d 460, Affirmed, Ala., 352 So.2d 479 (1977); *Johnson v. State*, Ala.Cr.App., 335 So.2d 663, cert. denied, Ala., 335 So.2d 678, cert. denied, 429 U.S. 1026, 97 S.Ct. 649, 50 L.Ed.2d 629 (1976); *Tillis v. State*, 292 Ala. 521, 296 So.2d 892 (1974).

The appellant was represented by appointed counsel during the coram nobis proceedings pursuant to Alabama law for defense of indigents, § 15-12-23, Code of Ala. 1975. There is no statutory authority in Alabama to provide funds for investigators and expert witnesses, and as stated in *Harris*, supra, this is a matter which addresses itself to the legislature rather than to the courts.

II

The appellant contends he was denied due process and equal protection of the law by virtue of systematic exclusion of blacks, women, and people of low income from the grand and petit jury venires in connection with the original trial in *Thigpen I*. This issue has been raised for the first time on petition for writ of error coram nobis. It was not raised in the trial court in the original trial nor on appeal. As stated in *Manson v. State*, Ala.Cr.App., 349 So.2d 67, cert. denied, Ala., 349 So.2d 86 (1977):

" '[F]ailure by the defendant in a criminal case to raise proper objection to the composition of a grand or petit jury, including, but not limited to, the constitutional ground of the jury selection process, before entering upon the trial of the case on its merits, constitutes a waiver of his right to do so, subject, of course, to the recognized exceptions of fraud and as to matters which were not known, or by the exercise of due diligence, could not have been known, before trial.' "

Accord: *Williams v. State*, Ala., 342 So.2d 1328 (1977); *Van Antwerp v. State*, Ala.Cr.App., 358 So.2d 782, cert. denied, Ala., 358 So.2d 791 (1978); *Andrews v. State*, Ala.Cr.App., 359 So.2d 1172 (1978); *Johnson v. Williams*, 244 Ala. 391, 13 So.2d 683 (1943).

The appellant's retained attorney at his original trial testified at the coram nobis hearing that he did not think it necessary at the original trial to file an objection to the composition of the grand and petit jury venires. He testified that now, in retrospect, he still thinks that it was unnecessary to file an objection. As observed in *Creel v. State*, 53 Ala.App. 226, 298 So.2d 647 (1974), the office of the writ of error coram nobis is not to retry indictments, rather it is to root out egregious fraud or collusion. Also see: *Fuller v. State*, Ala.Cr.App., 344 So.2d 216 (1977). There has been no showing of fraud in the composition of the jury venires, nor has there been any evidence tendered remotely pointing to a fraudulent

collusion which lead to the appellant's original conviction. In the absence of fraud, matters which were known at the time, or which could have been discovered by exercising due diligence, cannot be raised on petition for writ of error coram nobis.

III

The appellant contends that the trial court committed error by refusing to hear evidence at the coram nobis hearing pertaining to exclusion of prospective jurors opposed to capital punishment in the original trial. That issue was reviewed by this court on the original appeal and decided adversely to the appellant. *Thigpen I*, supra. The appellant did not petition the Alabama Supreme Court for writ of certiorari, and no further appeal was taken from the decision of this court. Coram nobis does not take the form of a delayed appeal. *Swain v. State*, 285 Ala. 292, 231 So.2d 737, vacated in part, 408 U.S. 936, 92 S.Ct. 2860, 33 L.Ed.2d 753, on remand, 290 Ala. 123, 274 So.2d 305 (1973); *Ex parte Rudolph*, 276 Ala. 392, 162 So.2d 486, cert. denied, 377 U.S. 919, 84 S.Ct. 1185, 12 L.Ed.2d 188 (1964); *Seagroves v. State*, 53 Ala. 481, 301 So.2d 245 (1974); *Braswell v. State*, 53 Ala.App. 645, 303 So.2d 145 (1974); *Kelly v. State*, 45 Ala.App. 144, 277 So.2d 141 (1969).

AFFIRMED.

All the Judges concur.

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing pages numbered 1 through 4 contain a full, true and correct copy of the opinion issued by this Court on April 17, 1979, in the appeal of Donald Thigpen v. State of Alabama. Jefferson Circuit Court, 6 Div. 938, as the same appears and remains of record and on file in this office.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 18th day of April, 1979.

/s/ MOLLIE JORDAN
CLERK, COURT OF CRIMINAL APPEALS OF ALABAMA

[Filed: April 17, 1979]

IN THE SUPREME COURT OF THE
STATE OF ALABAMA

GUY SPARKS and THE CALHOUN COUNTY, ALABAMA, BAR ASSOCIATION, an Unincorporated Association,

Petitioners,

S.C.Nos. 77-667 and 77-687

RE: GUY SPARKS, Petitioner, and THE CALHOUN COUNTY, ALABAMA BAR ASSOCIATION, ETC.,

Intervenor.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Guy Sparks, the petitioner and appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Alabama, affirming the overruling of petitioner's Motion to Rescind, Or Modify, Or For Other Relief, or, otherwise stated, affirming the dismissal of petitioner's complaint, which complaint was in the procedural form of a Motion to Rescind, Or Modify, Or For Other Relief, entered in this action on March 9, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ GUY SPARKS
GUY SPARKS
PETITIONER AND
APPELLANT AND
COUNSEL FOR
PETITIONER AND
APPELLANT
409 Commercial Bank Building
Anniston, Alabama 36201
Telephone (205) 237-5711

/s/ RICHARD B. EMERSON
RICHARD B. EMERSON
COUNSEL FOR
PETITIONER AND
APPELLANT
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586

PROOF OF SERVICE

I, Guy Sparks, petitioner-appellant in this cause, and counsel for petitioner-appellant in this cause, and a member of the bar of the Supreme Court of the United States, certify that all parties required to be served have been served with three copies of the foregoing Notice of Appeal to the Supreme Court of the United States. I do further certify that three copies of same were deposited in a United States Mailbox, first class postage prepaid, addressed to the Honorable Charles

Graddick, Attorney General, State of Alabama, counsel of record for the State of Alabama and the Honorable Robert M. Parker, Circuit Judge, Seventh Judicial Circuit, State of Alabama, at the post office address of such counsel, 250 Administrative Building, 64 North Union Street, Montgomery, Alabama, 36130; that three copies of same were deposited in a United States Mailbox, first class postage prepaid, addressed to the Honorable Robert M. Parker, Circuit Judge, Seventh Judicial Circuit, State of Alabama, at his post office address, Post Office Box 1794, Anniston, Alabama, 36202; that three copies of same were deposited in a United States Mailbox, first class postage prepaid, addressed to the Honorable James M. Campbell, Attorney and President of the Calhoun County Bar Association, Calhoun County, Alabama, at his post office address, Post Office Box 2003, Anniston, Alabama, 36202; that three copies of same were deposited in a United States Mailbox, first class postage prepaid, addressed to counsel of record for the Calhoun County Bar Association, the Honorable Richard B. Emerson, at his post office address, Post Office Box 1850, Anniston, Alabama, 36202; that three copies of same were deposited in a United States Mailbox, first class postage prepaid, addressed to counsel of record for the Alabama State Bar, the Honorable William H. Morrow, Jr., at his post office address, Post Office Box 671, Montgomery, Alabama, 36101.

Done this 12th day of March, 1979.

/s/ GUY SPARKS
GUY SPARKS
PETITIONER AND
APPELLANT AND
COUNSEL FOR
PETITIONER AND
APPELLANT
409 Commercial Bank Bldg.
Anniston, Alabama 36201
Telephone (205) 237-5711

IN THE SUPREME COURT OF THE
STATE OF ALABAMA

GUY SPARKS and THE CALHOUN COUNTY, ALABAMA, BAR ASSOCIATION, an unincorporated association,

Petitioners,

RE: GUY SPARKS, Petitioner, and THE CALHOUN COUNTY, ALABAMA, BAR ASSOCIATION, ETC.,

Intervenor.

S.C. Nos. 77-667 and 77-687

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Calhoun County, Alabama, Bar Association, an unincorporated association, one of the petitioners and appellants named

above, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Alabama, affirming the overruling of petitioner's Motion to Rescind, Or Modify, Or For Other Relief, or, otherwise stated, affirming the dismissal of petitioner's complaint, which complaint was in the procedural form of a Motion to Rescind, Or Modify, Or For Other Relief, entered in this action on March 9, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ RICHARD B. EMERSON
RICHARD B. EMERSON
COUNSEL FOR THE
PETITIONER AND
APPELLANT THE
CALHOUN COUNTY,
ALABAMA, BAR ASSOCIATION, an unincorporated
association
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586

PROOF OF SERVICE

I, Richard B. Emerson, counsel for the petitioner and appellant The Calhoun County, Alabama, Bar Association in this cause, and a member of the bar of the Supreme Court of the United States, certify that all

parties required to be served have been served with three copies of the foregoing Notice of Appeal to the Supreme Court of the United States. I do further certify that three copies of same were deposited in the United States Post Office in Anniston, Alabama, first class postage prepaid, addressed to the Honorable Charles Graddick, Attorney General, State of Alabama, counsel of record for the State of Alabama and the Honorable Robert M. Parker, Circuit Judge, Seventh Judicial Circuit, State of Alabama, at the post office address of such counsel, 250 Administrative Building, 64 North Union Street, Montgomery, Alabama 36130; that three copies of same were deposited in the United States Post Office in Anniston, Alabama, first class postage prepaid, addressed to the Honorable Robert M. Parker, Circuit Judge, Seventh Judicial Circuit, State of Alabama, at his post office address, Post Office Box 1794, Anniston, Alabama 36202; that three copies of same were deposited in the United States Post Office in Anniston, Alabama, first class postage prepaid, addressed to the Honorable James M. Campbell, Attorney and President of the Calhoun County Bar Association, Calhoun County, Alabama, at his post office address, Post Office Box 2003, Anniston, Alabama 36202; that three copies of same were deposited in the United States Post Office, first class postage prepaid, addressed to the Honorable Guy Sparks, a petitioner and appellant and counsel for said petitioner and appellant and counsel for said petitioner and appellant Guy Sparks in this cause, at his post office address, 409 Commercial National Bank Building,

Anninston, Alabama 36201; and that three copies of same were deposited in the United States Post Office in Anniston, Alabama, first class postage prepaid, addressed to counsel of record for the Alabama State Bar, the Honorable William H. Morrow, Jr., at his post office address, Post Office Box 671, Montgomery, Alabama 36101.

Done this the 9th day of May, 1979.

/s/ RICHARD B. EMERSON
RICHARD B. EMERSON
COUNSEL FOR THE PETITIONER AND APPELLANT THE CALHOUN COUNTY, ALABAMA, BAR ASSOCIATION, an unincorporated association
Post Office Box 1850
Anniston, Alabama 36202
Telephone (205) 237-9586